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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

NO. 311

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY and LOUIS J. AFFELDER, Executors of the Last Will and Testament of PAULINE MAY, Deceased, Petitioner,

v.

D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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v.

D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, deceased, respectfully shows:

Summary Statement of the Matter Involved.

The matter involved is whether, under Sec. 402 (c) of the Revenue Act of 1918, petitioners are required to include in the gross estate of decedent the value of the corpus of an

irrevocable trust created by the decedent, not in contemplation of death, which provided for the payment of the income thereof to decedent's husband, during his lifetime, and after his decease to decedent, during her lifetime, and for the distribution, after their decease, of all of the property in said trust among decedent's children, decedent's husband having survived her.

This is an action at law for the recovery of $5,763.82 with interest, estate taxes, collected by duress by the respondent.

Plaintiffs' testatrix died in the City of Pittsburgh, Pennsylvania on the 25th day of March, 1920. Her executors filed an estate tax return in which they disclosed a net estate for taxes of $148,461.53, on which there was a tax due of $2,469.23. The Commissioner of Internal Revenue made a demand for the payment of additional taxes amounting to $5,557.76, based, in the main, upon the inclusion by the Commissioner of certain property concerning which the testatrix made a trust, for the alleged reason that the trust was in contemplation of or intended to take effect in possession or enjoyment at or after the testatrix's death.

The testatrix made two declarations of trust, one dated May 17, 1917 (R. 12), in which it was recited that whereas the decedent holds certain property consisting of bonds, stocks, notes and money in bank, of a market value of about $150,000, which were purchased largely with the funds of her husband, Barney May, and she desires to place them in trust, as thereinafter mentioned, wherefore she transfers and assigns said property to B. May (who was her husband), W. A. May, H. L. May, E. C. May and L. J. Affelder, as trustees, the said trustees to pay to B. May the net income for life, and after his death, to Pauline May for life, if she survive him; and after the death of both of them, the said property is to be divided equally between her sons and daughter, W. A. May, Estelle M. Affelder, H. L. May

and E. C. May; all of which will appear in a formal instrument of trust to be drawn up, listing the said property, and to be duly executed by her.

The other was an agreement dated October 1st, 1917, (R. 13), between the decedent of the one part, and said trustees, wherein she transferred and assigned to said trustees the property therein mentioned, in trust, to collect the income, etc., and to pay the net dividends "to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all of the property in said trust * * * shall * * * be distributed equally among" her above named children.

Barney May survived his wife, and the estate tax return was made by him and the other executors named in her will.

Petitioners paid to respondent the sum of $33.34 additional tax due by reason of certain minor changes made in valuations, and made a claim for abatement of the balance of $5,524.42 of said additional tax assessment (R. 24). The said claim for abatement was rejected, and petitioners, upon demand of respondent, paid to respondent the sum of $5,524.42, together with interest at the rate of 10% per annum from April 5th, 1923, or a total of $5,763.82.

After petitioners filed a claim for refund (R. 27), which was rejected, they brought suit to recover the last mentioned sum with interest.

The respondent filed a motion to strike petitioners' statement of claim from the record, for the reason that the trust created by the decedent is properly included in the decedent's gross estate, under the provisions of Sec. 402 (c) of the Revenue Act of 1918 (R. 31).

The District Court held that the property covered by the trust constituted property with respect to which the decedent made transfers intended to take effect in possession or enjoyment at or after death, and directed judgment to be entered in favor of respondent on the question of law raised by the pleadings (25 F. (2d) 1004).

Petitioners appealed from said order to the Circuit Court of Appeals, which, in a per curiam, affirmed "on the opinion of the court below with the observation that this case is distinguished from *Nichols v. Coolidge*, 274 U. S. 531, on the facts." (32 F. (2d) 1017).

A petition for rehearing was filed for the reason that the question involved in this case was decided by this Court in the case of *Reinecke, Collector, v. Northern Trust Company*, 278 U. S. 339, favorable to petitioner's contention, a week earlier, and that the respondent had stated in its brief that the same issue that was involved in the instant case was presented in the said Reinecke case, in the following language: "The attention of the Court is called to the fact that the issue presented by the instant case will probably be settled by the United States Supreme Court in *Reinecke, Collector, v. The Northern Trust Co.*, No. 90 (24 Fed. (2d) 91)."

The petition for rehearing was refused.

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals erred in including in the gross estate of decedent the corpus of the trust.

2. The Circuit Court of Appeals has decided a doubtful question involving the construction of a taxing statute in favor of the Government and against the taxpayer, con-

trary to the principle of law pronounced by this Court in *Gould v. Gould,* 245 U. S. 151.

3. The Circuit Court of Appeals, in holding that the corpus of this trust should be included in the gross estate of decedent, has decided an important question of Federal law in a way probably untenable.

4. The Circuit Court of Appeals, in holding that the corpus of this trust should be included in the gross estate of decedent, has decided an important question of Federal law in a way probably in conflict with the applicable decisions of this Court.

5. The question whether there should be included in the gross estate the corpus of this trust under the provisions of the Act of 1918, is one of far reaching importance, and is also one of first impression. The matter involves a determination of an important question of general law for the guidance of all taxpayers similarly situated.

6. The question involved is of general importance. The same principles are involved in a number of cases now pending before the courts, the Board of Tax Appeals, and the Treasury Department. For the information of taxpayers generally, the question should be authoritatively determined by this Court.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 3811 October

Term, 1928, Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, deceased, Appellants, v. D. B. Heiner, Collector of Internal Revenue for the 23rd District of Pennsylvania, and that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, Deceased,

By

CHARLES H. SACHS,

LOUIS CAPLAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court is reported at 25 F. (2d) 1004. The opinion of the Circuit Court of Appeals is reported at 32 F. (2d) 1017.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 9, 1929. A petition for rehearing was filed on January 18th, 1929. The order denying the petition for rehearing was entered June 24, 1929. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938.

III.

Statement of the Case.

A statement of the case appears in the petition, and, in the interest of brevity, is not repeated.

IV.

Specification of Error.

The Circuit Court of Appeals for the Third Circuit erred in holding that the value of the corpus of the trust fund should be included in the gross estate of the decedent.

V.

Argument.

THE TRANSFER IN THIS CASE WAS EFFECTIVE TO PASS THE TITLE TO THE PROPERTY AND THE ECONOMIC BENEFITS TO BE DERIVED THEREFROM IMMEDIATELY WHEN IT WAS MADE, ON OCTOBER 1ST, 1917.

There was no power reserved to revoke the transfer or trust. The economic interest was divided, of course. During the lifetime of the husband of the settlor, the income was payable to him. If he died before she did, the income went to her, during her lifetime. The remainder was transferred absolutely to the children.

The language of the statute is as follows:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property. * * * (c) to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) * * *."
>
> *Revenue Act of 1918* (February 24, 1919, 40 Stat. at L. 1096, 1097, Chap. 18).

The only interest which decedent had in the property at the time of her death was her contingent life estate. Everything else she had effectually transferred. She could not, if she changed her mind, retake what she had given to her husband, a life estate in the income, and what she had given to her children, the remainder after the death of her husband and herself.

"What this law taxes is not the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of the death."

Y. M. C. A. v. Davis, 264 U. S. 47, at p. 50.

The interest which ceased by reason of Mrs. May's death was her contingent interest.

If neither the value of the life estates, nor that of the remainders, were required to be included in the gross estate in the Reinecke case (278 U. S. 339), notwithstanding the fact that the remainders were intended to take effect in possession or enjoyment at or after settlor's death, the value of the life estate given here to Barney May, settlor's husband, and the value of the remainder given to her children, should not be included in the gross estate. The circumstance that in this case there was the possibility of a life estate in favor of settlor intervening does not detract from the finality and irrevocability of the estates given to others. In the Reinecke case, the economic benefit was divided into two parts or interests. Here it *might* have been divided into three parts or interests, and only one of these interests could cease on Mrs. May's death.

The Government erroneously contended in the Reinecke case, as to the five trusts, that even without the reserved powers to manage and modify the trusts, the transfers of the *remainder* interests were all subject to the tax because, within the language of sec. 402, they were intended to take effect in possession or enjoyment at or after his death.

In denying this contention, the Court said:

"One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax,

if the gift takes the form of a life estate in one, with remainder over to another, at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute."

In principle, there is no difference between the gift of a life estate to A, with remainder to B, and a gift of a life estate to A, a life estate to Z, if the latter survives A, and the remainder to B.

All that can be taxed is the value of that which the settlor did not give away, but which he retained for himself, and which passed from him to some one else upon his death. The language of this statute leans more in the direction of such a conclusion than it does to the contention of the Government. But if there is any doubt about it, the doubt should be resolved in the taxpayer's favor: *Gould v. Gould,* 245 U. S. 151.

This Court has not decided, so far as we have been able to discover, the precise question whether a reservation by the settlor of the possession and enjoyment of the income during his life in a trust or transfer created after the passage of the estate tax code authorizes the imposition of a tax on the corpus of the trust. As we read those opinions of this Court which may be said to shed a light on the question, we find that they lay down the principle that a tax attaches only in those cases where there is a shifting of the economic use and benefit of property upon the death of settlor, and that *the tax is measured by the value of the economic benefits which pass from the settlor to his successor by the settlor's death.*

There is nothing in the cases of *Chase National Bank v. U. S.,* 278 U. S. 327, or in the Reinecke case, against our position.

In the first case, the insured had full power at all times during his lifetime to dispose of the entire economic benefits or enjoyment in the life insurance policies.

In the Reinecke case, as to the two trusts, the corpus of which this Court held was taxable, the settlor reserved the right to revoke them, and upon the exercise of this right, the trustee was required to return the corpus of the trust to him. He was, therefore, during his lifetime, in the same position as if he were making gifts from time to time of the income, and without obligation to continue them. As we understand the opinion, whatever a person gives away, not in contemplation of death, is free from taxation. But it must be a real gift, without strings attached to it. The extent of the gift, the share of the economic benefit or interest given, is immaterial, providing it is a gift, an irrevocable gift, from the moment of its making.

In *Carnill v. McCaughn,* 30 F. 2d, 696, the facts as stated by the Court in its opinion (p. 697) were that the decedent made a transfer of property to a trustee, reserving to himself the income from the property during his life, the remainder going at his death to named beneficiaries. The interests of the latter were vested and absolute, and there was no power of revocation or control over the gift retained by the donor. The Court held that there is to be excluded from the taxation:

> "transfers by way of gift *of the remainder* after a life estate reserved, when the gift is not in contemplation of death, is absolute, and the decedent up to the time of his death had no power of control over it, or to direct the course of distribution of the property by his action or non-action." (Italics ours). (p. 699).

The Government stated in the Court below that it did not contend that the transfer in this case was made in contemplation of death.

The Government argued below that it must be assumed from the record that Pauline May survived her husband because the Commissioner failed to deduct the value of Barney May's life estate, and cited *United States v. Rindskopf,* 105 U. S. 418. The Government, in all fairness, should not attempt by casuistry to establish that to be a fact which it knows is not a fact, in order to gain some advantage over the taxpayer. It has available its own records in the matter of the estate tax of Barney May, which show that Barney May survived his wife. Besides, there is a letter of the Treasury Department attached to the amended statement of claim, record, page 18, which is addressed to Barney May et al., Executors, Estate of Pauline May. This shows that the estate tax return in the Pauline May Estate was made by Barney May, and the others, as executors. The will shows that the Barney May who was named as an executor was decedent's husband, and we all know that letters testamentary are not granted to a dead person. The estate tax return referred to in the statement of claim, paragraph 3, record, page 3, shows that Barney May was living and making the return. In order not to encumber the record, we did not attach to the statement of claim a copy of the entire return, but attached only the schedules that were relevant and material to the issue. The case of *U. S. v. Rindskopf,* 105 U. S., 418, cited by the Government, cannot be tortured into an authority for the false assumption that Barney May died before his wife, in view of the circumstances above set forth.

IF THE REVENUE ACT OF 1918 ACCORDING TO A CORRECT CONSTRUCTION PURPORTS TO AUTHORIZE THE TAX HERE IMPOSED, IT IS UNCONSTITUTIONAL.

Nichols v. Coolidge, 274 U. S. 531.

We respectfully submit that nothing more than a mere reading of the language of this transfer, and of sec. 402 (c) of the revenue act of 1918, will show the applicability

of the following from the opinion of this Court in the case of *Reinecke v. Northern Trust, Executors,* 278 U. S. 339:

"In the light of the general purpose of the Statute, and the language of sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in sec. 402 (subdivision c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under sec. 401. That doubt must be resolved in favor of the taxpayer. *Gould v. Gould,* 245 U. S. 151. * * *"

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